Teamsters Local 287, International Brotherhood of Teamsters[1] ***and*** **Granite Rock Company.** Case 32–CB–5817–1

May 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On July 14, 2005, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent-Union and the Charging Party-Employer each filed exceptions and supporting briefs. The Employer and the General Counsel each filed an answering brief to the Respondent-Union's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order as modified.

The judge found that the Respondent violated Section 8(b)(3) of the Act, by unduly delaying a ratification vote on the tentative agreement reached with the Employer on July 2, 2004,[2] and by unilaterally imposing conditions on the submission of that agreement to a ratification vote by the employees. To remedy the violation, the judge recommended a cease-and-desist order against the Respondent. He rejected the Employer's request that the Respondent also be ordered to honor the collective-bargaining agreement retroactively to July 2, 2004. Rather, because the parties had agreed that employee ratification was a condition precedent to a final binding agreement, and because that ratification did not occur until August 22, that judge determined that a final and binding agreement was not formed until that latter date.[3]

The Employer excepts, renewing its argument that, remedially, the Board should require that the tentative agreement be made retroactive to July 2. Under the particular circumstances of this case, we agree.[4]

Discussion

It is well settled that nothing in the Act imposes an obligation on statutory bargaining agents to obtain employee ratification before final and binding agreement occurs. *North Country Motors, Ltd.*, 146 NLRB 671, 674 (1964). The parties, however, may agree that employee ratification is a condition precedent to a final and binding contract. See, e.g., *Hertz Corp.*, 304 NLRB 469 (1991); *Sunderland's Inc.*, 194 NLRB 118, 118 fn. 1 (1971). Employee ratification becomes a condition precedent to the formation of a contract only when the parties have reached an express agreement to that effect. *Observer-Dispatch*, 334 NLRB 1067, 1072 (2001). Where there is such an express bilateral agreement, the Board finds that a contract cannot become effective until ratification occurs. *Hertz Corp*., supra.

In the instant case, ratification did not occur until August 22. Thus, the judge found that the remedy for the violation should be to make the contract effective only as of that date. We disagree, and we shall make the contract effective as of July 2. But for the unlawful failure to submit the contract for ratification on July 2, the employees would have ratified it on that date (as they did at the ratification vote of August 22).

It is well established that the Board has broad discretion to fashion "a just remedy" to fit the circumstances of each case it confronts. *Maramont Corp.*, 317 NLRB 1035, 1037 (1995). *Campbell Electric Co.*, 340 NLRB 825, 826 (2003) (a "remedy should restore the status that would have obtained if Respondent had committed no unfair labor practice . . . [and] any uncertainty and ambiguity regarding the status that would have obtained without the unlawful conduct must be resolved against the Respondent, the wrongdoer who is responsible for the existence of the uncertainty and ambiguity." (citation omitted)).[5]

Following these principles, the Board has ordered a respondent-employer to reinstate its unlawfully withdrawn bargaining proposals and, if those proposals are accepted, retroactively give them effect, even though a final agreement had not been reached, and even though

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] All dates are 2004, unless otherwise specified.

[3] The judge, citing *Local 282 Teamsters (*E. G. *Clemente Contracting)*, 335 NLRB 1253 (2001), held that the General Counsel, not the Charging Party, determines the theory of the case and that a judge has no authority to amend a complaint without the General Counsel's consent. He declined to recommend a retroactive remedy because the General Counsel's theory was that the Respondent unlawfully delayed the ratification vote, not that it was bound to a contract as of July 2. We agree that, in light of the complaint, we cannot and do not find that the failure to execute the July 2 contract was unlawful under Sec. 8(b)(3). However, this does not preclude us from ordering the implementation of that contract as a remedy for the Sec. 8(b)(3) violations that are found. We do not pass on the validity of any claim of breach of contract.

[4] The Employer has requested oral argument on this issue. The request is denied as the record, exceptions, and briefs adequately present the issues and positions of the parties

[5] See also NLRB *v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 196 (1941).

there was "no absolute certainty" that the parties would have reached a final agreement. *TNT Skypak, Inc.*, 328 NLRB 468, 469 (1999), enfd. 208 F. 3d 362 (2d Cir. 2000).

In *TNT Skypak*, the judge found that the respondent-employer unlawfully withdrew from tentative agreements reached with the union when it became apparent that the union was about to accept the employer's proposals, "thereby making a contract inevitable." 328 NLRB at 468. The judge's remedy granted the union an option of accepting the employer's contract proposals to form a contract that would be effective retroactive to the date of the unfair labor practice. The employer argued that the judge improperly ordered that the contract be given retroactive effect, because all of the employer proposals expressly provided for prospective application.

The Board concluded that, even though the contract proposals themselves expressly provided for only prospective application, the collective-bargaining agreement's effective date should not be the date that it was physically executed. Rather, the Board found that the critical date was the "'initial date upon which, *but for* Respondent's unlawful conduct, the agreement would have been executed.'" (quoting *Crimptex, Inc*. 221 NLRB 595(1975) (emphasis in original). 328 NLRB at 469. It so found even though there was "no absolute certainty that the parties would have immediately reached a final and complete agreement had the Respondent's proposal not been unlawfully retracted . . . ." However, the Board, quoting the judge, specifically found that the Union had "'essentially accepted the Company's demands.'" The Board drew the reasonable inference that, but for the respondent's unlawful conduct, the parties would have reached accord on the collective-bargaining agreement. Id. at 469-470.

Moreover, the Board said that its remedy was not contrary to the Supreme Court's holding in *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970), that the Board can not "compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement." The Board observed that the respondent-employer had voluntarily agreed to a proposal that the collective-bargaining agreement would become effective upon "execution." Thus, the Board's remedial Order "merely provides that where the Respondent's unlawful conduct frustrates the formation of a contract, the 'execution date' is the date the agreement would have been executed but for the Respondent's unfair labor practice." 328 NLRB at 470.

Although *TNT Skypak* did not involve employee ratification as a precondition to the formation of a binding contract, the Board's remedial measures to restore the status quo are equally appropriate here. Indeed, the facts here offer an even more compelling case for giving retroactive effect to the tentative agreement in order to remedy the Respondent's unlawful conduct.

In the present case, there is no dispute that a complete agreement, subject to employee ratification, was reached on July 2. The Respondent agreed to hold a ratification vote on July 2 and to recommend ratification to employees. The Respondent's negotiator expressed uncertainty only whether one provision, concerning Saturday work, would be agreeable to the bargaining unit employees. That provision was accepted by the employees in a straw poll at the meeting on July 2. The Union did not hold the ratification vote until August 22. That delay was unlawful under Section 8(b)(3). On August 22, the employees ratified the tentative agreement reached by the parties on July 2. Thus, but for the Respondent's unlawful delay of the ratification vote, the tentative agreement would have been ratified and become final as of that date. To the extent there is any uncertainty about whether the employees would have ratified the tentative agreement if they had voted on July 2, it should be resolved against the Respondent as the wrongdoer. *TNT Sky Pak*, supra, at 470. See also *Campbell Electric*, supra, at 826.[6] Accordingly, we will issue an appropriate Order.

THE AMENDED REMEDY

As the Respondent violated its obligations under the Act by unlawfully delaying the ratification vote on the tentative agreement reached with the Employer, we shall order that the Respondent give retroactive effect to the terms of the agreement reached with the Employer on July 2, 2004, as if ratified on that date.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Teamsters Local 287, International Brotherhood of Teamsters, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

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[6] We find *Long Island Day Care Services, Inc.*, 303 NLRB 112 (1991), relied on by the judge, to be distinguishable. In that case, Board found that the employer violated Sec. 8(a)(5) by delaying the submission of a tentative contract for ratification by its board of directors, which was a precondition for a binding contract. The contract had not been ratified, and the Board therefore had no basis to order its implementation as a remedy. See 303 NLRB at 127-128, 129, and 134. In the present case, by contrast, the employees did ratify the contract, and thus, the pertinent question is whether, in order to remedy the Respondent's unlawful delaying of the ratification, the agreement should be considered final as of the date of the Respondent's unfair labor practice. As indicated above, we have answered that question in the affirmative.

1. Insert the following as paragraph 2(a) and reletter subsequent paragraphs.

"(a) Give retroactive effect to the terms of the tentative agreement reached with the Employer on July 2, 2004, as if ratified on that date."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C., May 31, 2006

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the Employer, Granite Rock Company, by unduly delaying the submission of a collective-bargaining agreement negotiated by our agent to the bargaining unit employees for a ratification vote.

WE WILL NOT refuse to bargain collectively with the Employer by unduly delaying the voting by the bargaining unit employees on ratification of a proposed collective-bargaining agreement.

WE WILL NOT refuse to bargain collectively with the Employer by unilaterally imposing conditions on the submission of a bargaining agreement for ratification.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL give retroactive effect to the provisions of the collective-bargaining agreement reached with the Employer on July 2, 2004, as if ratified on that date.

TEAMSTERS LOCAL 287. INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Valerie Hardy-Mahoney, Esq., for the General Counsel.
Duane B. Beeson, Esq. (Beeson, Tayer & Bodine), of Oakland, California, for the Respondent.
Alan S. Levins, Esq. and *Gabriel S. Levine, Esq. (Littler Mendelson)*, of San Francisco, California, for the Employer.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Oakland, California, on May 11 and 12, 2005. On July 8, 2004, Granite Rock Company (Employer) filed the charge in the instant case alleging that Teamsters Local 287, International Brotherhood of Teamsters, AFL–CIO (Respondent), committed certain violations of Section 8(b)(3) of the National Labor Relations Act (the Act). On October 21, 2004, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(b)(3) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, including observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Granite Rock Company is a California corporation with an office and principal place of business located in San Jose, California, where it is engaged in the manufacture and nonretail distribution of concrete and related products. The Employer, during the 12 months prior to the issuance of the complaint, sold and shipped goods and products valued in excess of $50,000 directly to customers who themselves meet one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standards. Accordingly, Respondent admits and I find that Granite Rock Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I find that it is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The Respondent and the Employer have been party to a series of collective-bargaining agreements for Granite Rock's employees at its San Jose Concrete facility since at least 1999. The most recent agreement between Respondent and the Employer expired by its terms on April 30, 2004. On March 23, 2004, the parties opened negotiations for a contract to succeed the expiring contract. The parties met on five occasions. On July 2, 2004, the parties reached agreement on a new contract, subject to ratification. Ratification of the contract was not held until August 22, 2004. The collective-bargaining agreement was ratified by the bargaining unit on August 22 and executed by the parties in December 2004. The General Counsel contends that Respondent violated Section 8(b)(3) of the Act by refusing to submit the agreement for ratification from July 2 to August 22 and by conditioning ratification upon Employer agreement to a "back to work" or strike settlement agreement. Respondent contends that the tentative agreement was not only subject to ratification but also subject to agreement on a back-to-work agreement. Further, Respondent contends that it could lawfully condition final ratification and acceptance of the collective agreement on reaching full agreement on a back-to-work agreement. Respondent contends that the back-to-work agreement vitally affected the terms and conditions of employment of the bargaining unit employees and further that the Employer consented to and fully participated in negotiating a comprehensive back-to-work agreement. Moreover, the Employer seeks a remedy which would require Respondent to apply the contract (particularly the no-strike clause) retroactive to July 2, 2004. the General Counsel and Respondent oppose that remedy.

B. Facts

1. Background

The Employer and its affiliates are suppliers of construction materials, including concrete, aggregate and asphalt. The Employer and its affiliates have facilities in 22 locations including San Jose, Redwood City, Gilroy, Salinas, Monterey, Watsonville and Santa Cruz. The Employer has at least 17 collective-bargaining agreements with various unions, including locals of the Operating Engineers, the Machinists, the Laborers and the IBEW in addition to four separate locals of the Teamsters Union. This case involves the Employer's San Jose concrete plant and Respondent, Teamsters Local 287. However, some background, regarding the Employer's other facilities and collective-bargaining agreements, is necessary due to certain defenses raised by the Union.

As stated earlier, the most recent agreement between Respondent and the Employer covering the San Jose concrete facility expired by its terms on March 31, 2004. That agreement covered approximately 25 ready mix drivers employed at the San Jose concrete plant. In addition, the Employer and the Union had a separate collective-bargaining agreement covering drivers and yardmen at the Employer's facility in Gilroy, California. Respondent also was party to a multi-union agreement with the Employer covering the Employer's quarry operations in San Benito County. The Operating Engineers, Laborers, Machinists and Respondent were all party to this collective-bargaining agreement with the Employer. The multi-union quarry collective-bargaining agreement expired on July 15, 2004. Three other Teamsters local unions have agreements with the Employer including Teamsters Local 853 which has an agreement covering drivers employed at the Employer's Redwood City or Peninsula plant.

Respondent notes that each of the collective-bargaining agreements referred to above contained a no-strike clause relevant to its defense. Although the wording of the no-strike clauses is not identical for all agreements, in general terms the no-strike clauses allow employees to honor a picket line of another union at any of the Employer's facilities only upon the following conditions: (1) if the picketing is lawful and primary; and (2) if the picketing is sanctioned by the appropriate regional labor council; and (3) if there has been 15 full working days of "both withholding services [at the struck facility] and primary picketing at the Employer's facility where the picketing occurs."

2. Negotiations and tentative agreement

On March 23, the parties commenced negotiations for a collective-bargaining agreement to succeed the agreement which was set to expire on April 30. Respondent was represented by George Netto, business agent, and two employee-members of the negotiating team, Brian Driscoll and Christopher Nowak. The Employer was represented by Bruce Woolpert, president and CEO, and Shirley Ow, director of human resources. By June 9, the parties had not reached agreement and the Union went on strike in support of its bargaining demands. Pickets were established at the San Jose concrete plant and also at the Employer's Redwood City, San Benito County and Gilroy facilities. Picketing was later extended to the Employer's facilities in Salinas, Monterey and Santa Cruz.

On June 20, the parties met again in negotiations, but little progress was made. On July 1, Woolpert and Ow attended a meeting with a federal mediator involving negotiations with the Operating Engineers, Machinists, Laborers and Respondent concerning the Employer's quarry in San Benito County.[1] At the end of the discussions regarding the quarry, the mediator told Woolpert that Netto wished to remain and discuss the Employer's San Jose concrete plant. Woolpert inquired about the Union's wage proposal and believing that the Union's proposal was too high, Woolpert declined the invitation to bargain. However, while Woolpert and Ow were having lunch, Woolpert called Netto to obtain an explanation of Netto's wage proposal. Netto told Woolpert that the mediator was mistaken and gave Woolpert the Union's correct proposal. Woolpert then responded that the parties were not that far apart and that Woolpert thought that he and Netto could reach agreement that

[1] The multiunion collective-bargaining agreement covering the quarry was set to expire on July 15, 2004.

day. Netto and Woolpert agreed to meet and negotiate that evening at the Employer's facility in San Jose.

Prior to the meeting on the evening of July 1, Ow prepared a new Employer proposal and a separate "back to work" or strike settlement agreement. At the meeting on July 1, the Union was represented by Netto along with employees Driscoll and Nowak. The Employer was represented by Woolpert and Ow. Woolpert presented the Union with the Employer's May 20 proposals and July 1 proposals, which taken together, constituted a proposal for a full collective-bargaining agreement. Woolpert stated that his purpose was to reach a settlement agreement so that the employees could return to work. Woolpert, having a history with this Union and with other locals of the Teamsters Union, knew that the agreement had to be ratified by the bargaining unit employees.[2] Therefore, the Employer's July 1 proposal contained the following language: "This supposal is subject to formal acceptance by the Union and the Employees no later than Friday, July 2, by 6:00 a.m., otherwise this Supposal is withdrawn."

Netto, Nowak and Driscoll reviewed Woolpert's proposals and took a Union caucus. When the Union returned from its caucus Netto objected to the severance language and made a counter proposal regarding the Employer's wage package. In addition Netto proposed changes regarding the collection of dues and Saturday overtime. Thereafter, Woolpert and Ow caucused. Ow made changes to the July 1 proposal on severance and economics. She also changed the date on the proposal since it was the past midnight and already July 2.

Netto and Woolpert reviewed the July 2 proposal. Netto expressed a desire to retain the previous contract's Saturday work language. Woolpert's proposal contained revisions in that language. They negotiated a change in the language and reduced it to writing. Netto then requested a deletion of certain language on the July 2 proposal and Woolpert agreed. By 4:00 a.m. the parties had agreed to a tentative contract. While Netto expressed some uncertainty as to whether the Saturday work language would be agreeable to the employees, he agreed to recommend ratification of the contract. Woolpert knew, and Netto stated, that the collective-bargaining agreement would not be final and binding until ratified by the bargaining unit employees. Netto informed Woolpert and Ow that he did not believe he could get the employees together and the contract ratified by the 6 a.m. deadline. Netto said he needed to remove the pickets from the Employer's facilities and get all the employees to the meeting. He told Woolpert that he could not get everything done by 6 a.m. but he believed he could get it done by 9 a.m. Woolpert agreed and asked Ow to change the ratification deadline to 9 a.m. that morning. Netto noticed that certain language was missing regarding dues and Woolpert agreed to correct that matter.

Thereafter, Ow attempted to consolidate the various proposals into one document. However, she encountered some problems with her printer. After Ow printed out the final draft proposal, Netto stated that the parties needed a back-to-work agreement. This was the first time that a back-to-work agreement was mentioned.[3] Netto suggested that the parties proceed the way they had done for the Gilroy agreement in 2003. In 2003 the Union ratified an agreement for the Gilroy facility and the employees abandoned their strike and returned to work. Thereafter, Woolpert and Netto negotiated a back-to-work agreement. Woolpert, desiring that the San Jose employees return to work immediately, agreed that the parties could negotiate a back-to-work agreement over the next week. Woolpert stated that he had a draft of a back-to-work agreement and had Ow give Netto a copy of that draft. Netto stated that he saw a problem regarding the Employer's retention of subcontractors whom he labeled "scabs." Netto said that he would forward the draft to the Union's attorney and then he would contact Woolpert.

3. Events subsequent to tentative agreement

After tentatively agreeing to a new collective-bargaining agreement, Netto had the employees cease picketing and come to meeting. In addition, Netto faxed a copy of Woolpert's proposed back-to-work agreement to the Union's attorney. At 9:30 that morning, Netto passed out the tentative contract and reviewed its terms with the bargaining unit employees. However, Netto did not hold a ratification vote. A poll was taken regarding the new language concerning Saturday work. Driscoll and Nowak reported to Netto that the employees had accepted the Saturday work proposal.

The Employer contends that the employees did in fact ratify the contract on the morning of July 2. However, the record does not support such a finding. Netto, Driscoll and Nowak all testified that the only vote that took place at the meeting on July 2 was strictly on the one page proposal concerning Saturday work. There is no evidence to contradict that testimony.

Later on the morning of July 2, Netto faxed Woolpert a copy of the Union's counterproposal on a back-to-work agreement. The proposal included provisions requiring the Employer to withdraw any and all unfair labor practice charges, lawsuits, other administrative proceedings, grievances, or claims involving the San Jose Concrete unit or other bargaining units represented by other labor organizations.[4] The proposal also provided that the Employer could not file future actions against the Union or against sympathizing labor unions arising out of the strike. Finally, Respondent also sought amnesty for striking employees and sympathy strikers for alleged misconduct. Apparently, Woolpert did not receive this proposal until July 3. On July 5, Netto contacted the employees and informed them that the strike would continue.

[2] The Union's constitution requires ratification by the bargaining unit employees.

[3] Netto testified that earlier during negotiations for the quarry agreement, he had told Woolpert that Respondent needed a back-to-work agreement in order to ratify the San Jose concrete agreement. That testimony is not credited. Such testimony was not included in Netto's prehearing affidavit. Further, this testimony was not corroborated by any of the union representatives present at the alleged conversation. Finally, both Woolpert and Ow credibly denied this testimony.

[4] At the time of the Union's July 2 proposed back to work agreement, there were numerous pending grievances filed by the Employer against the various unions that had engaged in sympathy strike action in other bargaining units.

On July 6, the first work day after the holiday weekend, pickets returned to the San Jose facility. Woolpert spoke with Netto and took the position that the employees should return to work. Netto said that the employees would not return to work without a back-to-work agreement. Woolpert said he would review the Union's proposal.

Also on July 6, Netto held a meeting with employees at which he told them that they could not go back to work without a back-to-work agreement. According to Netto, Respondent had to protect the people outside the bargaining unit who had helped the employees during their strike. Later that day, Woolpert faxed Netto a proposed back-to-work agreement which confined its terms to the San Jose bargaining unit employees. Netto faxed a letter to Woolpert in which he stated "it is in the interest of all concerned to return our members to work as soon as possible, now that we have reached a tentative agreement. But it is necessary for you to understand that the return to work agreement has to be settled *before* [emphasis in original] your proposal will be put to the membership for ratification." Netto then stated the basis of the Union's refusal to submit the tentative agreement to a ratification vote:

> By confining the back-to-work agreement to the San Jose facility, and leaving open Graniterock's right to retaliate against Union members elsewhere, and start lawsuits and grievances against Locals that adhered to union principles during the strike, you have raised issues of principle that are a basic part of the union movement. You simply don't understand what our brotherhood and sisterhood is all about if you think this Local Union doesn't give a damn about our unity and the idea of helping one another. We are not about to give up our commitment to labor history and its ideals in order to make peace with Graniterock.

Woolpert faxed a response to Netto stating that "back to work matters with regard to other unions and locations is not a required subject of bargaining." That same date, the Employer's attorney faxed a letter to the Union's attorney stating that the Employer and Respondent had reached a new collective-bargaining agreement on July 2, subject only to ratification by the Union membership. The Employer's attorney contended that based on Netto's suggestion the parties had agreed to negotiate a back-to-work agreement during the week of July 12, after the employees had returned to work on July 6. The Employer then contended that on Monday July 5, for the first time, Respondent took the position that a back-to-work agreement was required before the employees could return to work. The Employer also contended that the tentative contract had, in fact, been ratified at the Union meeting of July 2.[5] While this letter sought to negotiate a back-to-work agreement, relevant here is the fact that the attorney's letter indicated that Respondent by seeking to bargain about other bargaining units, was seeking to bargain about permissive subjects of bargaining.

4. The resumption of the strike and subsequent events

On July 7, Respondent began picketing at the San Jose facility and at other facilities of the Employer. On July 8, the Employer filed the instant unfair labor practice charges. On July 9 the Employer filed to enjoin the Union's strike and picketing activities in the United States District Court in San Jose.[6] Thereafter, the parties continued to negotiate over a back-to-work agreement and the Union continued to insist that no ratification vote would take place until agreement was reached on a back-to-work agreement. However, while the Employer engaged in such negotiations it attempted to preserve its positions that the employees had ratified the contract and that the Union was demanding bargaining over non-mandatory subjects of bargaining.

On July 15, the bargaining agreement for the quarry expired. On August 22, while negotiations were still in progress for a collective-bargaining agreement covering the quarry, Respondent finally conducted a ratification vote on the tentative agreement at issue herein. The employees ratified the contract. However, at that time a strike at the quarry was in progress for more than 15 days. The San Jose concrete employees honored that strike and picket line and, therefore, did not return to work until September 13. The agreed upon collective-bargaining agreement was not executed by the parties until December 17, 2004. The parties never did reach agreement on a back-to-work agreement.

B. Analysis and Conclusions

Section 8(b)(3) of the Act provides: "It shall be an unfair labor practice for a labor organization or its agents— (3) to refuse to bargain collectively with an employer, provided it is the representative of its employees subject to the provisions of Section 9(a)." Section 8(d) of the Act explicitly requires the parties to a collective-bargaining relationship to to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). "When an oral agreement is reached as to the terms of a collective-bargaining contract, each party is obligated, at the request of the other, to execute that contract when reduced to writing, and a failure or refusal to do so constitutes" a violation of Section 8(b)(3) of the Act. *Liberty Pavilion Nursing Home*, 259 NLRB 1249 (1982)*; Interprint Co.*, 273 NLRB 1863 (1985). "It is well established that technical rules of contract do not control whether a collective-bargaining agreement has been reached." *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87, 89 (8th Cir. 1981). Rather, the crucial inquiry is whether there "is conduct manifesting an intention to abide and be bound by the terms of an agreement." *Capital-Husting Co. v. NLRB*, 671 F.2d 237, 243 (7th Cir. 1982). In determining whether underlying oral agreement has been reached, the Board is not strictly bound by technical rules of contract law but is free to use general contract principles adopted to the bargaining context. *Americana Healthcare Center*, 273 NLRB

[5] As indicated above, I find no evidence that the employees ratified the contract on July 2.

[6] The District Court case was still pending at the time of the instant hearing.

1728 (1985). The burden of proof is on the party alleging the existence of the contract. *Cherry Valley Apartments,* 292 NLRB 38 (1988).

It is equally clear however, that a union (or an employer for that matter) may establish a condition precedent for final acceptance of a contract. *Hinney Printing Co.*, 262 NLRB 157, 164-165 (1992)*; Local 850 Painters (Morgantown Glass & Mirror, Inc.)* 177 NLRB 155 (1969). Moreover, when a party asserts that approval of the negotiated agreement by another party was a condition precedent to a final and binding contract, notice of this condition must be clear and unambiguous. *Local 365 UAW (Cecilware Corp.)* 307 NLRB 189, 193–194 (1992)*; Kasser Distiller Products Corp.*, 307 NLRB 899 (1992)*; Induction Services, Inc.*, 292 NLRB 863, 865 (1984)*; Ben Franklin National Bank*, 278 NLRB 986, fn. 2 (1985)*; University of Bridgeport*, 229 NLRB 1074 (1977). In the instant case, both parties agreed to the collective-bargaining agreement subject to one condition; ratification by the bargaining unit employees. Both parties understood that there was no agreement unless and until the bargaining unit employees ratified the contract. Netto agreed to recommend ratification of the agreement and to hold a meeting on July 2 in order to do so.

Under common law principles, there is an implied covenant of good faith and fair dealing between the parties to a contract. While essential terms of a contract on which the minds of the parties have not met cannot be supplied by the implication of good faith and fair dealing, it does not appear unreasonable to expect a contracting party, in this case the Union, to hold the ratification vote as promised. I find that Respondent's failure to hold the ratification vote unreasonably delayed the bargaining process in violation of Section 8(b)(3) of the Act

In *Long Island Day Care Services, Inc.*, 303 NLRB 112 (1991), the Board found that the respondent-employer violated Section 8(a)(5) of the Act by unreasonably delaying the submission of a tentative agreement to its board of directors for ratification. The Board held that the delay in submitting the proposed contract to the respondent-employer's directors constituted an unwarranted and unjustified delay in a crucial aspect of the bargaining process. Thus, the Board found a violation of Section 8(a)(5) and (1) of the Act. The similar actions by the Union in this case constitute an unwarranted and unjustified delay contrary to the Union's obligations under Section 8(b)(3) and Section 8(d) of the Act.

The Union contends that the tentative agreement was also conditioned on a back-to-work agreement. As stated above, notice of such a condition must be clear and unambiguous. See, *Active Transportation Co.*, 340 NLRB 426 (2003), In this case the evidence is clear that on the morning of July 2 there was a tentative collective-bargaining agreement, subject only to ratification by the employees. The Respondent and Employer agreed to negotiate a back-to-work agreement the following week. Thus, the parties contemplated that the contract would be ratified and that the employees would return to work prior to resolution of the back to work issues. If the employees rejected the contract and did not ratify it, the parties would have returned to the bargaining table. It was not until after the time had passed for the agreed upon ratification vote that Netto demanded a back-to-work agreement *before* he would hold the promised ratification vote.

Under the common law of contracts, a party to a contract cannot take advantage of his own act or omission to escape contract liability. In the instant case, the Union and Respondent had agreed to a contract subject to ratification by the bargaining unit employees. The Union should not be able to take advantage of its own failure to submit the contract for ratification. Respondent prevented the condition precedent from being satisfied.

The General Counsel further argues that Respondent violated Section 8(b)(3) by conditioning the holding of the ratification vote on the Employer's willingness to reach agreement on nonmandatory subjects of bargaining. The Union contends that even though the back-to-work agreement it sought covered other unions and other bargaining units, it was a mandatory subject of bargaining. That dispute is irrelevant to the resolution of the instant case. As the evidence clearly shows, the Union from July 2 to August 22, refused to conduct the promised ratification vote prior to agreement on a back-to-work agreement. I find that the Union could not condition the holding of a ratification vote on any matter, mandatory or nonmandatory. The agreement of the parties was that they had a collective-bargaining contract subject to only one condition, ratification by the bargaining unit employees, which was to take place on the morning of July 2. The Union was not privileged to place any further conditions on ratification or on the contract.

The Union contends that the Employer bargained concerning its back to work proposals and, therefore, that the Union did not insist to impasse on non-mandatory subjects of bargaining. I find the fact that the Employer engaged in various attempts to resolve the dispute and the strike irrelevant. The Employer never agreed that settlement of the back-to-work agreement was a condition precedent to the holding of the agreed upon ratification vote. The Employer consistently took the position that the contract had been ratified and that the Union was seeking to bargain about nonmandatory subjects of bargaining. No clear and unmistakable waiver can be found. The Employer never waived its right to insist that the Union present the tentative contract to the bargaining unit employees in accordance with the understanding of the parties.

CONCLUSIONS OF LAW

1. The Employer is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(b)(3) of the Act, by unduly delaying the submission of a collective-bargaining agreement negotiated by its agent to the bargaining unit employees for a ratification vote, unduly delaying the voting by the bargaining unit employees on the aforementioned

agreement, and by unilaterally imposing conditions on the submission of the bargaining agreement for the ratification vote.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Employer seeks a remedy which would require Respondent to honor the collective-bargaining agreement retroactive to July 2, 2004. Respondent contends that the traditional remedy sought by the Board would not adequately remedy the Union's violations. The Employer seeks retroactive application of the bargaining agreement so that it can attempt to apply the no-strike provisions retroactively.

First, I note that this case was alleged by the General Counsel as a unreasonable delay in bargaining and not a refusal to sign an agreed upon contract. In *Local 282 Teamsters (E. G. Clemente Contracting),* 335 NLRB 1253 (2001), the Board reaffirmed the notion that the General Counsel, not the Charging Party, determines the theory of the case. Citing *GPS Terminal Services*, 333 NLRB 968 (2001), the Board stated that a judge has no authority to amend a complaint in a manner that was neither sought nor consented to by the General Counsel, even where the record evidence would support the additional allegations. Here, contrary to the allegations of the Employer, the evidence does not support a finding that the contract was ratified on July 2. Thus, the evidence does not support a finding that the Union refused to sign an agreed upon contract.

In *Long Island Day Care Services, Inc.,* 303 NLRB 112, (1991), relied on above, the remedy for the respondent-employer's unreasonable delay in submitting the tentative contract to its board of directors was a cease and desist order and the posting of a Board notice. I will recommend a corresponding remedy in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent Teamsters Local 287, International Brotherhood of Teamsters, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Employer, Granite Rock Company, by unduly delaying the submission of a collective-bargaining agreement negotiated by its agent to the bargaining unit employees for a ratification vote.

(b) Refusing to bargain collectively with the Employer, Granite Rock Company, by unduly delaying the voting by the bargaining unit employees on the aforementioned agreement.

(c) Refusing to bargain collectively with the Employer, Granite Rock Company, by unilaterally imposing conditions on the submission of the bargaining agreement for the ratification.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its hiring hall, meeting rooms, and offices in San Jose, California, copies of the attached notice marked Appendix."[8] Copies of the Notice, on forms provided by the Regional Director for Region 32 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material.

(b) Within 14 days after service by the Region, sign and return to Regional Director for Region 32 sufficient copies of the notice for posting by the Granite Rock Company, if willing, at all places where notices to employees are customarily posted. Further, Respondent-Union shall duplicate and mail, at its own expense, a copy of the Notice to Employees and Members, to all former bargaining unit employees employed by the Employer at any time since July 2, 2004, and to all current bargaining unit employees employed at any work site at which the Employer is unable for any reason to post the Notice to Employees and Members.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, San Francisco, California, July 15 , 2005.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we have violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

[7] All motions inconsistent with this recommended order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To organize
To form, join or assist any union
To bargain collectively through representatives of their own choice
To act together for mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with the Employer, Granite Rock Company, by unduly delaying the submission of a collective-bargaining agreement negotiated by our agent to the bargaining unit employees for a ratification vote.

WE WILL NOT refuse to bargain collectively with the Employer by unduly delaying the voting by the bargaining unit employees on ratification of a proposed collective-bargaining agreement.

WE WILL NOT refuse to bargain collectively with the Employer by unilaterally imposing conditions on the submission of a bargaining agreement for ratification.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act.

TEAMSTERS LOCAL 287. INTERNATIONAL BROTHERHOOD OF TEAMSTERS AFL–CIO